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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00-10
Television Service	)	
	)	

COMMENTS OF FOX TELEVISION STATIONS, INC. AND FOX BROADCASTING COMPANY

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Summary

Fox Television Stations, Inc. and Fox Broadcasting Company (collectively "Fox") request that the Commission carefully consider the impact this new Class A service will have on broadcast spectrum management when establishing this new protected Class A status for a subset of qualifying low power television ("LPTV") licensees. Congress clearly recognized that full-power television licensees have invested significant time and resources in preparation for the transition to digital television ("DTV").

To minimize any adverse impact on spectrum management, the Commission therefore should adhere to the eligibility criteria and licensing time frames set forth in the Community Broadcasters Protection Act ("CBPA"), and not accept applications to convert to Class A status in the future. In addition, because hundreds of LPTV stations have been shoe-horned between full-power television stations in the Table of Allotments, protection of Class A contours should be based on interference studies using the Longley-Rice methodology, subject to case-by-case waivers to avoid spectrum gridlock. Further, as the Commission has tentatively concluded, Class A stations should be required to protect DTV licensees' right to maximize their service areas pursuant to already existing Commission rules, which contemplate the expansion of service areas through increased power or antenna height.

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Comments of Fox Television Stations, Inc. and Fox Broadcasting Company

Fox Television Stations, Inc. ("FTS") and Fox Broadcasting Company ("FBC" and collectively with FTS, "Fox") respectfully submit these comments in response to Commission's Notice of Proposed Rulemaking in the above-captioned proceeding ("*Class A NPRM*"). In the *Class A NPRM* the Commission seeks comment on a wide range of issues relating to implementation of the Class A television service for qualifying low power television ("LPTV") licensees as required by the Community Broadcasters Protection Act of 1999 ("CBPA"). FTS, as the licensee of 22 full-power television stations, and FBC, as the operator of a national television network with more than 200 affiliates nationwide, have direct interests in the impact that the statutorily required Class A service will have on the already complex task of spectrum management during the transition to digital television.

I. Class A Eligibility and Licensing Should Adhere to the Criteria and Time Frames Set Forth in the CBPA.

The Commission expressly requested comment on whether LPTV stations must apply for a Class A license within the time frame established in the CBPA or whether the Commission may continue to accept applications from LPTV stations to convert to Class A status in the future.[1] The Commission also invited comment on alternative criteria for Class A eligibility.[2] In response, Fox strongly discourages the Commission from continuing to accept applications to convert to Class A in the future. As the Commission recognizes, the CBPA provides that LPTV licensees intending to seek Class A designation "shall submit" to the Commission a certification of eligibility within 20 days after enactment, but that such licensee "may submit" an application for Class A designation within 30 days after the Commission adopts implementing regulations.[3] Fox maintains that, by using mandatory rather than permissive language in section 336(f)(1)(B), Congress intended to fix the universe of LPTV stations eligible for Class A designation as of a date certain (i.e., January 28, 2000). In contrast, through the use of permissive language in section 336(f)(1)(C), Congress granted this fixed universe of qualifying

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1 *See Class A NPRM*, para. 9.

2 *See id.*, para. 12, 21.

3 *See* 47 U.S.C. § 336(f)(1)(B)-(C).

LPTV stations (assuming subsequent grant of certificates of eligibility) flexibility with respect to the filing the Class A license applications. In other words, the earliest date on which an application for a Class A license may be filed is 30 days after the Commission adopts final implementing regulations.

Similarly, Fox maintains that section 336(f)(2)(B) does not provide the Commission with carte blanche authority to ignore the statutory eligibility criteria for Class A licenses.[4] The statutory eligibility criteria underscore that Congress intended to reward through interference protection those LPTV licensees who had admirably served their communities through a minimum of 18 hours of broadcast service a day, consisting of at least 3 hours per week of locally produced programming, and who had demonstrated compliance with the applicable Commission regulations governing low power television. The Commission therefore should use sparingly the flexibility afforded by section 336(f)(2)(B). LPTV stations failing to meet the statutory eligibility criteria should bear the burden of demonstrating why the public interest would be served by granting an otherwise ineligible station the opportunity to receive a Class A license. In sum, as Congress wisely recognized, the already complex process of spectrum management during the transition to digital

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4 *See Class A NPRM*, para. 21.

television mandates that the Commission adhere to the statutorily prescribed time frames and eligibility criteria.

II. Protection of Class A Service Contours Should Be Based on an Interference Study using the Longley-Rice Methodology Subject to Waiver.

Fox generally agrees with the Commission's tentative conclusion that full-service television stations should protect the service areas of Class A stations based on an interference study similar to the method specified in sections 74.703 and 74.705 of the Commission's rules, 47 C.F.R. §§ 74.703, 74.705.[5] As in section 74.703, the interference study should be conducted using the Longley-Rice methodology per OET Bulletin No. 69.

Fox strongly recommends that the Commission not use minimum distance separations as the method of protecting Class A service areas.[6] In devising regulations to implement the Class A service, the Commission cannot ignore the historical evolution of the NTSC Table of Allotments and LPTV. Specifically, the analog table was developed based on mileage separations; it was not based on per case interference showings.[7] Upon creation of the LPTV service, hundreds of stations operating at varying levels of low power were shoe-horned into the environ-

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5 *See Class A NPRM*, paras. 14-15.

6 *See id.*, para. 14.

7 *See generally* 47 C.F.R. § 73.610.

ment already operating under the Table of Allotments using a classic interference analysis.[8] Affording protection primarily based on minimum distance separations thus is not practical because minimum distance assumes operation with uniform facilities, which is not the case with LPTV stations.[9]

Nevertheless, because LPTV stations occupy small interstices between full power television stations in the Table of Allotments, the Commission's implementing regulations must provide sufficient flexibility to avoid spectrum gridlock. For example, the proximity of a protected Class A station could render routine relocation and facility changes of full-power DTV and analog television stations (e.g., license modifications necessitated by storm damage to transmission tower, loss of a tower lease, or the availability of an improved site) virtually impossible due to an increase in interference that may result from a change in tower height or location. The Commission therefore should entertain waivers on a case-by-case basis to permit interference to the protected contours of a Class A station based on good cause shown.[10] Such waivers would be the exception, not the norm, and would

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8 *See An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Communications System*, 51 R.R.2d 476, 479 (1982) ("*LPTV Report and Order*").

9 *See* 47 C.F.R. § 74.735 (specifying maximum power level for LPTV stations).

10 *See generally* 47 C.F.R. §1.3 (providing that the Commission may waive its (continued...)

be granted only upon a showing of special circumstances warranting deviation and upon an affirmative showing that the public interest would be served by grant of the waiver.[11] For example, the applicant for waiver could be required to make the following three-part showing: (1) the existing transmission facility is no longer desirable; (2) reasonable sites that would not result in impermissible interference to the Class A contour are not available; and (3) of the viable alternative sites, the proposed new site results in the least interference to the Class A protected contour.[12]

Absent the flexibility afforded by a clearly articulated waiver policy, the already complex task of spectrum management could be unnecessarily compounded with the establishment of a Class A television service. The fact remains that the laws of physics simply do not permit an infinite number of over-the-air television stations. Moreover, the Commission must recognize that some degree of flexibility will be required because protection of Class A service areas of stations

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10 (...continued)
regulations for good cause shown).

11 *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (concluding that a rule is more likely to be undercut if it does not in some way take into account consideration of hardship, equity, or more effective implementation of overall policy).

12 See, *e.g., 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 13 FCC Rcd. 14849, 14860-61 (1998) (FCC proposing criteria for waiver of spacing requirements for FM radio service).

operating at or near U.S. borders implicates cross-border spectrum coordination with Canada and Mexico.

III. Class A Stations Must Protect DTV Licensees' Right To Seek Maximization Regardless of the Existence of Technical Problems.

A. The CBPA Preserves the Absolute Right To Maximize Service Areas Pursuant to Existing Commission Rules.

Fox agrees with the Commission's tentative conclusion that Class A stations should be required to protect all full-power stations seeking to maximize their digital service areas, regardless of the existence of "technical problems," provided that the full power station filed either a maximization application by December 31, 1999 or a notice of intent to maximize by December 31, 1999 followed by a "bona fide" maximization application by May 1, 2000.[13]

Section 336(f)(7) sets forth specific interference protection requirements for Class A licensees. Section 336(f)(7)(A)(iv) provides that Class A licensees must not cause interference with "[full-power television] stations seeking to maximize power under the Commission's rules, if the station has complied with the notification requirements in paragraph (1)(D)."[14] That is, Class A licensees are absolutely required to protect from interference the digital service area of a station

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13 *See Class A NPRM*, para. 33.

14 47 U.S.C. § 336(f)(7)(A)(iv).

that has filed an application for maximization of its service area or a notice of intent to seek such maximization by December 31, 1999 and a bona fide application for maximization by May 1, 2000 – even if grant of the maximization application would cause more than *de minimis* interference to the signal contour of the Class A applicant. The cross-reference to section 336(f)(1)(D) only relates to the notification requirement.[15] The protection from interference of stations seeking to maximize their service area is in no way limited or qualified by the need to resolve technical problems. Moreover, although section 336(f)(1)(D) is entitled "Resolution of Technical Problems," it is a well-known tenet of statutory construction that headings do not control.[16]

As the licensee of three stations with out-of-core DTV allotments,[17] FTS agrees that the Commission must preserve the maximization rights of such stations when they are subsequently required to move their digital operations back to channels within the core spectrum after the transition to digital television is com-

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15 *See* 47 U.S.C. § 336(f)(7)(A)(ii)(IV).

16 *See, e.g., Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) (The headings and titles of a statute "cannot limit the plain meaning of the text.").

17 The FTS owned-and-operated stations with out-of-core DTV allotments are: KTBC, Austin, Texas, on DTV channel 56; KTTV, Los Angeles, California, on DTV channel 65; and WJBK, Detroit, Michigan, on DTV channel 58.

plete.[18] Fox, however, maintains that it is premature to discuss spectrum re-packing at this time. As the Commission itself has recognized, "in implementing a new technology, such as DTV, stations will need some experience to make an appropriate decision on which channel to keep."[19] Moreover, issues such as maximization rights implicated by spectrum re-packing affect the entire broadcast television service and thus exceed the scope of this Class A rulemaking proceeding. While the Commission should not take any action in the present rulemaking proceeding that would derogate the maximization rights of these broadcast stations, Fox recommends that the Commission defer the intricacies of spectrum re-packing to a future biennial review of the DTV regulations.[20]

On a going forward basis for maximization applications filed after May 1, 2000 (other than those necessitated by spectrum re-packing), the Commission should establish interference criteria defining the level of permissible *de minimis* interference that a DTV maximization or modification application may cause to a

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18 *See Class A NPRM*, para. 34.

19 *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, 13 FCC Rcd. 7418, 7441 (1998).

20 *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12850 (1997) (Commission stating that it will conduct reviews of the progress of DTV every two years).

Class A station's service contour.[21] Because LPTV stations currently are authorized with secondary-use status, many LPTV stations already experience interference load greater than 10 percent. Interference to LPTV stations simply was not contemplated when the Commission adopted the *de minimis* standard for DTV to NTSC interference. Consequently, under 47 C.F.R. § 73.623(c)(2) as currently written, affording LPTV stations protection against a DTV application to increase or modify service area effectively would preclude such maximization applications. Fox therefore recommends that the Commission define *de minimis* interference allowances for DTV protection of Class A stations as a change that would not result in more than an additional 2 percent increase in the population served by the Class A station being subject to interference with a total interference level not to exceed 20 percent of the Class A station's population.[22]

Section 336(f)(1)(D) provides a further exception to the preservation of the signal contours of Class A applicants if technical problems arise during the conversion to digital that require an engineering solution to the allotted parameters or

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21 *See Class A NPRM*, para. 15.

22 *Cf.* 47 C.F.R. § 73.623(c) (defining *de minimis* interference allowances for DTV protection of NTSC stations as no more than an additional 2 percent of the population being subject to interference, provided that no new interference may be caused that would result in an NTSC station receiving interference in excess of 10 percent of its population).

channel assignment in the DTV table of allotments or to ensure that a full-service station can replicate or maximize its service area, as contemplated by existing Commission rules. Fox agrees that this section gives full-power stations the flexibility to make adjustments in the DTV table of allotments, including but not limited to changes in channel allotments necessitated by any technical problems, even after certification of an LPTV station's eligibility for Class A status.[23] Further, because the statute provides the flexibility to make adjustments to the DTV table of allotments, Class A applicants/licensees – not the entity seeking modification to the DTV allotment table – should bear the burden of demonstrating that a practical and cost-effective modification can be made in a manner that will not impinge on the service area of the Class A station.[24]

As to the Commission's request for comment on the definition of the term "maximization,"[25] Congress was quite precise when it referred to the concept of maximization. Indeed, in the legislative history of the CBPA, Congress cross-referenced the Commission's own definition contained in paragraph 31 of the *DTV*

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23 *See Class A NPRM*, para. 36.

24 *See id.*, para. 37.

25 *See id.*, para. 32.

Sixth Report and Order.[26] And thus any references to "maximization" or "maximized facilities" in the CBPA encompass the process by which stations increase their service areas by operating either with additional power or at higher antennae than specified in the DTV table of allotments pursuant to section 73.622(f) of the Commission's rules, 47 C.F.R. § 73.622(f). Further, consistent with section 73.622(d) of the Commission's rules, 47 C.F.R. § 73.622(d), the term "maximization" also includes a change in the location of a DTV transmitting antenna that is within 5 kilometers of the DTV reference coordinates.

B. Preserving the Right To Maximize Service Areas Promotes the Commission's Policy of Encouraging Conversion to Digital Television.

Preserving the absolute right to maximize recognizes that full-power television licensees have made significant investments in equipment and engineering studies in reasonable reliance on existing Commission rules and policy. On average Fox has already invested $3-4 million on DTV equipment and installation for each of its owned-and-operated television stations. In many cases, Fox has purchased up-sized hardware in reliance on the ability to seek maximization of service areas pursuant to existing Commission rules.

Imposing any limits on the ability to maximize, other than the statutory notification requirements of section 336(f)(1)(D), will impede the ability of

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[26] *See* 145 Cong. Rec. S14725 (daily ed. Nov. 19, 1999).

full-power television broadcasters to provide digital television signals to the largest number of viewers. Unless viewers have access to DTV signals, there is no incentive to convert to digital television. Any regulatory action that in effect limits the number of households receiving DTV service could jeopardize (or, at minimum, delay) the transition from analog to digital television. Any delay in the transition from analog to digital television will in turn delay the return of the 6 MHz channel by broadcasters. Moreover, affording protection to Class A stations over subsequent maximization applications could have the unintended effect of perpetuating the disparity in coverage areas between UHF and VHF stations in the DTV paradigm.

IV. LPTV Licensees That Elect To Convert To Class A Status Must Comply with All Part 73 Regulations Applicable to Television Broadcasters.

Fox agrees with the Commission's intention to apply to Class A applicants/licensees all Part 73 rules except those which are inconsistent with the low power at which such stations operate.[27] On a related issue, Fox further agrees with the Commission's tentative conclusion that the current power levels are sufficient to preserve existing service and further increases could hinder the rollout of digital television service.[28]

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27 *See Class A NPRM*, para. 20.

28 *See id.*, para. 54.

The CBPA in no uncertain terms provides that from and after the date of an application for a Class A license, the LPTV station *must* comply with the Commission's rules for full-service television stations.[29] Requiring compliance with the Part 73 rules applicable to all television licensees will not work hardship on any LPTV licensee because the CBPA does not mandate that all LPTV stations seek Class A status. Rather, Congress by enacting the CBPA intended to buttress the commercial viability of those LPTV stations already operating – albeit at a lower power – in a manner similar to full-service television stations and providing valuable programming to their communities. Congress rewarded this service by certain LPTV licensees by granting them protected, primary status as a television broadcaster.

Along with this primary status as a television broadcaster, however, comes certain responsibilities, namely compliance with the interference protection requirements applicable to all full-service television broadcasters, informational and educational children's programming requirements, limits on commercialization during children's programming, political programming rules, and main studio and public inspection file requirements. Similarly, Class A transmitters should be subject

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[29] *See* 47 U.S.C. § 336(f)(2)(A)(i)(III); *see also* 145 Cong. Rec. S14725 (daily ed. Nov. 17, 1999).

to the same Part 73 technical standards and verification requirements as other broadcast television transmitters.[30]

Moreover, principles of regulatory parity dictate that Class A applicants should be required to comply with all requirements in Part 73 of the Commission's rules with the limited exception of those technical requirements with which Class A licensees would be physically incapable of complying due to the lower power of these stations. The rules with which Class A stations could *not* comply are 47 C.F.R. §§ 73.606 & 73.607 (table of allotments), 73.610 (minimum distance separations), and 73.614 (power and antenna height requirements). In addition, unlike full service NTSC stations which have Grade A and Grade B contours,[31] Class A stations would have only a single protected contour defined by the field strength values currently used to protect LPTV *vis-a-vis* other LPTV and translator stations.[32] Also, due to the lower operating power of Class A stations, the minimum field strength requirements, 47 C.F.R. § 73.685(a), would be correspondingly reduced.

Finally, because Class A licensees will be on equal footing with all other broadcast television licensees, Fox maintains that the Class A implementing

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30 *See Class A NPRM*, para. 57.

31 *See* 47 C.F.R. § 73.683(a).

32 *See Class A NPRM*, para. 10 (specifying protected LPTV signal contours of 62 dBu for stations on channels 2-6; 68 dBu for stations on channels 7-13; and 74 dBu for stations on channels 14-69).

regulations should be a new section created within the Commission's rules.[33] LPTV stations that do not elect to seek Class A status, however, would continue to be regulated as a distinct broadcast service pursuant to the existing regulations in Part 74.

V. Class A Multiple Ownership Restrictions Serve No Useful Purpose in the Currently Competitive Television Marketplace.

Fox supports the Commission's tentative conclusion not to apply common ownership restrictions to LPTV stations afforded Class A status.[34] Section 336(f)(3) provides that no LPTV station "may be disqualified from a Class A license based on common ownership with any other medium of mass communication." Congress clearly intended the exemption from multiple ownership restrictions to attach to the station, and thus Class A licenses should be immune from multiple ownership restrictions, including 47 C.F.R. § 73.3555, even if the license is subsequently transferred to a buyer with other media interests following conversion to Class A status.

When the Commission created the LPTV service, it concluded that the public interest would be best served through no ownership restrictions on LPTV

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33 *See id.*, para. 20.

34 *See id.*, para. 22.

stations.[35] The granting of protected Class A status to a subset of qualifying LPTV licensees does not now warrant government intervention in the marketplace.[36] Indeed, applying any common ownership limits to Class A stations could harm the commercial viability of these stations. Such a result would be completely contrary to the Congressional intent underlying the CBPA.

VI. Conclusion

As discussed above, the implementation of the Class A television service to provide interference protection to a subset of qualifying LPTV licensees undoubtedly will compound the complexity of spectrum management during the critical transition to digital television. Fox therefore respectfully urges the Commission to abide by the Congressional desire to provide interference protection only to that fixed subset of LPTV licensees that satisfy the enumerated eligibility criteria and to preserve the ability of full-power television stations, who file notices of intent to

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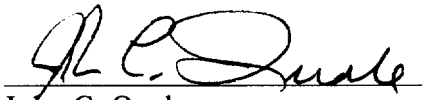
35 *See LPTV Report and Order*, 51 R.R. at 513-516.

36 As stated in the legislative history of the CBPA, Congress has concluded that "[t]he video programming marketplace is intensely competitive." 145 Cong. Rec. S14724 (daily ed. Nov. 17, 1999).

maximize and maximization applications by the statutory deadlines, to maximize their service areas pursuant to existing Commission rules.

Respectfully submitted,

FOX TELEVISION STATIONS, INC.
FOX BROADCASTING COMPANY

By: 

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